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Supreme Court, U.S.
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(1)

No.

In The
Supreme Court of the United States

AARON FLINT, *Petitioner*,

v.

GEORGE DENNISON, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF MONTANA-MISSOULA; THE ASSOCIATED STUDENTS OF THE UNIVERSITY OF MONTANA; KYLE ENGELSON, IN HIS OFFICIAL CAPACITY AS THE ASUM ELECTIONS COMMITTEE CHAIR, ET AL, *Respondents*.

On Petition for Writ of Certiorari to the U. S. Court of Appeals for the Ninth Circuit

Petition for a Writ of Certiorari

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Questions Presented

(1) Whether, consistent with the First Amendment, the educational mission of a public university is sufficient to justify expenditure limits on privately-funded extracurricular political speech by candidates for student government.

(2) Whether a privately-funded election for student government at a public university is a "limited public forum," as defined in the Ninth Circuit, and whether, in this context, the state needs only to show a rational basis to justify content-based limitations on political speech.

Parties to the Proceedings

The following additional respondents were defendants in the District Court and appellants in the Court of Appeals:

Justin Baker, Averiel Wolff, Sophia Alvarez, Anna Green, Kris Monson, Derek Duncan, and Katie Boeckx, in their official capacities as Associated Students of the University of Montana's ("ASUM") Elections Committee Members, Gale Price, President; Vinnie Pavlish, Vice President; Cassie Morton, Business Manager and ex-officio members of the ASUM Senate; Jessica Adam, Bryce Bennet, Andrew Bissell, Brad Cederberg, Tyler Clairmont, Nezha Haddouch, Shawna Hagen, Chris Healow, Andrea Helling, Derf Johnson, Britta Padgham, Kimberly Pappas, Josh Peters, Rebecca Pettit, Jake Pipinich, Ross Prosperi, Jon Snodgrass, Leslie Venetz, Nathan Ziegler, and Casey Hogue, in their official capacities as ASUM Senators.

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Petition for a Writ of Certiorari

Petitioner respectfully requests a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

Opinions Below

The order of the court of appeals denying rehearing and its judgment are unreported. 53a. Its opinion affirming the district court is reported at 488 F.3d 816. App. 1a. The district court opinion is reported at 361 F. Supp. 2d 1215. App. 40a.

Jurisdiction

The court of appeals denied Petitioner's rehearing petition on July 13, 2007. App. 53a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitution, Statutes & Regulations Involved

U.S. Const. Amend. I is in the Appendix at 54a. Relevant portions of the ASUM Constitution and Bylaws are in the Appendix at 54a-71a.

Statement of the Case

The overarching question presented by this case can be simply put: Can a public university limit student government candidate speech through expenditure limits? The Ninth Circuit approved a rule adopted by the University of Montana ("UM"), through its student government, limiting candidate campaign expenditures to only $100 on its 10,000 student Missoula campus. This holding is contrary to this Court's decisions in *Morse v. Frederick*, 127 S. Ct. 2618

(2007),[1] *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969), *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Randall v. Sorrell*, 126 S. Ct. 2479 (2006). Without considering UM's rule under these cases, the Ninth Circuit instead applied forum analysis and found the student government elections to be a "limited public forum," in contradiction to *Widmar v. Vincent*, 454 U.S. 263 (1981). The court below then applied rational basis scrutiny and found the educational mission of the university[2] justified the candidate campaign expenditure limits. In addition to being contrary to decision of this Court, the Ninth Circuit analysis conflicts with decisions of numerous other circuits.

Although the question raised by this case can be simply stated, the answer lies in an array of decisions of this Court, fraught with complexity in application, which have spawned confusion and conflict in the lower courts.

In light of this Court's holding in *White*, can the speech of a candidate ever be limited? Under *Randall*,

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[1]This Court decided *Morse* after the three judge panel handed down its decision in this case and the petition for rehearing en banc was filed. The Ninth Circuit, therefore, did not consider *Morse* in reaching its decision. This Court should grant certiorari, vacate the Ninth Circuit opinion and remand this case for reconsideration in light of *Morse*. In the alternative, this Court should grant certiorari and set the case for briefing on the merits.

[2]The district court deferred to UM's academic autonomy and found the limits reasonable in "ensur[ing] all students enjoy equal access to the educational benefits available through student elections and governance."App. 41a.

can expenditure limits on a candidate's campaign ever be justified? With regard to the school speech cases, does a public university's educational mission justify limitations on core political speech under the boundaries this Court set in *Morse*? Under *Tinker*, does the First Amendment protect a student's nondisruptive, privately-funded, extracurricular and independent political advocacy?

"[T]he courts of appeals have not applied a clear or consistent analytical model to school expression cases in the past two years. Rather the courts have relied on any of several doctrines or tests to guide their decisions, and the guidance from these tests has produced inconsistencies in the law." Susan Dente Ross, *Silenced Students: The Uncertain But Extensive Power of School Officials to Control Student Expression* 79 Journalism & Mass Comm. Q. 172, 182 (Spring 2002) [hereinafter *Silenced Students*].

Beyond these questions, the lower court's forum analysis raises even more questions and conflicts–does allowing a university student government election, where the campaign is conducted only in part on university property, establish a government forum? If it does, is it a "designated public forum" or a "limited public forum?" And what protection is afforded political speech in each? "As a result of the confusion among the categories, courts may classify the same or similar locations under different names, and because particular–if sometimes differing–standards of review are attached to these names, these courts may reach contrary results." Ronnie Fischer, *"What's in a Name?" An Attempt to Resolve the "Analytical Ambiguity" of the Designated and Limited Public Fora* 107 Dick. L. Rev. 639 (Winter 2003) [hereinafter *"What's in a Name?"*].

This case presents a unique opportunity for this

Court to provide guidance to the lower courts in areas of law fraught with confusion and conflict and, in so doing, ensure that First Amendment rights are consistently protected.

I. The Regulations

At the time of the election at issue in this case, ASUM Bylaws Article V § 2(G)(3) limited Aaron Flint's candidate campaign expenditures for the ASUM Senate to $100. App. 70a.[3] The maximum expenditure allowed for a President-Vice President team was $100 and for Business Manager $100. *Id.* The limits apply to a broad range of campaign activities, whether conducted on the university campus or not, including the public sidewalks and city streets of Missoula. Campaigning is defined as "any activity which directly or indirectly promotes the candidacy of one or more individuals for an office," including a candidate's personal appearances, the posting or publishing of advertisements, distribution of literature, lobbying voters, and the buying of votes with money, gifts, or alcohol. App. 68a-69a.[4]

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[3]Presently, with or without a primary election, the maximum expenditure for Senators is $75, for a President-Vice President team $150, and for Business Manager $75. ASUM Bylaws Art. V §2(H)(1-3) (2005) (available at http://www.umt.edu/asum/government/bylaws.htm#ArticleV).

[4]Since the filing of this suit, ASUM's definition of campaigning has been broadened:

> Campaigning, with the exception of primary petition signing, is defined as any activity which promotes the candidacy of one or more individuals for an office. This includes, but is not necessarily limited to, scheduling appearances, the buying of

The limits apply to candidates' spending their own money on their campaign, but do not apply to noncandidates and interest groups, who are also not limited, in practice, by the Bylaw's limits on placement of posters.[5] *See* App. 73a-74a.

II. The Facts

A. Background

1. ASUM's Government Functions

The Associated Students of the University of Montana is established as an agency of the state by University of Montana Bd. of Regents Policy 506.2, 506.3. All registered students are members and must pay the activity fee constituting the funds that the ASUM is charged with disbursing. App. 56a.

Every enrolled undergraduate student at UM with a minimum G.P.A. of 2.0 (in a 4.0 grading system) may run for and hold any elected office in ASUM. App. 55a. ASUM government's activities are ministerial and expressive, not academic. Students receive no grades for participation in ASUM government, and its President and Vice President are paid. ASUM elected leaders exert considerable influence on the campus community, shaping University decisions through

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votes with money, gifts, or alcohol, posting or publishing advertisements, *holding a charity event such as a concert, rally or other social gathering,* distributing literature, or lobbying a voter.

ASUM Bylaws Art. V § 2(A) (2005) (emphasis added) (available at http://www.umt.edu/asum/government/bylaws.htm#ArticleV).

[5] *See* App. 69a-70a (ASUM Bylaw limiting placement of campaign materials).

various boards, councils, and committees.[6] These bodies have general jurisdiction over ASUM rules governing student body conduct and are required to comply with applicable federal laws, the Board of Regents' policies, and the ASUM Bylaws.

2. ASUM's Expressive Functions

The ASUM lobbies the student body, the administration and the state legislature, advocating policy changes. *See* ASUM, *Current Legislation* (June 27, 2007) (available at http://www.umt.edu/asum/government/resolution.htm).

The Board on Member Organizations reviews all applications for groups and organizations applying for ASUM recognition and/or ASUM funding. Those meeting recognition requirements are forwarded to the ASUM Senate to be approved by a two-thirds (2/3) majority vote. App. 60a. In fiscal year 2004, the ASUM allocated approximately $500,000 in student activity

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[6]Committees and boards include the Relations and Affairs Committee, responsible for, inter alia, "recommending all changes to the ASUM Bylaws and ASUM Personnel Policy" and overseeing the functions of four ASUM executive agencies, App. 58a-59a; the Publications Board, which oversees all ASUM-funded publications, including the *Montana Kaimin* and *Cutbank* "without infringing on First Amendment rights," App. 64a; the University Center Board, which advises and oversees the University Center's policies, activities, and staffing, App. 65a-66a; and the Radio Board, which oversees the general operations of the student radio station, including all major format or structural changes and the student radio station budget. App. 67a.

fees,[7] which are public funds,[8] to over 150 student academic and honors organizations and ideological, political and social organizations.

Recognized groups use the funds to provide services for UM's 10,000 students and to advocate for or against University policies, fees, and hiring decisions, and state and national policy on a wide range of political and social issues from diverse viewpoints.[9] *See* ASUM, *Fiscal Policy* April 11, 2007) (available at http://www.umt.edu/asum/government/fiscal2.htm).

Furthermore, candidates' views and positions on ASUM's actions and policies are debated in support or opposition to their election to office. *See, e.g.*, App. 73a-76a; Aaron Flint, *Voter Guide* (Verified Amended Complaint, Exhibit 8 (Doc. # 1)); Sean Breslin, *Helling has Performed Admirably as ASUM President*, Montana Kaimin (July 18, 2007); Ashley Zuelky, Mike Gerrity, *Leftridge Wins Presidency*, Montana Kaimin (April 27, 2007).

B. The Events Leading to the Suit

Flint ran for a position on the ASUM Senate in the ASUM general election, held between April 27 and April 28, 2004, to determine the representative body of ASUM for the 2004-2005 academic year. Flint was qualified to run for the Senate in all respects.

During the elections, a large number of posters criticizing Flint as a "lapdog" of then-governor Judy

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[7] In fiscal year 2007, allocations were $775, 000.

[8] *See* 35 Op. of MT Att'y Gen. 74 (1974).

[9] For example, supported groups include Catholic Campus Ministry and the Muslim Student Association to the Students for Choice and the Students for Peace and Justice.

Martz were placed on the UM campus. *See* App. 76a. In some cases, two oversized posters were placed in a single classroom. *See* App. 74a. Flint believes that most, if not all, the posters were placed by leaders of the Montana Public Interest Research Group and the University of Montana College Democrats. *Id.* These organizations are not subject to the expenditure limits applicable to candidates. Flint believed that he had to compete with the ads "head to head" in order to make his views known. Flint spent a total of two hundred fourteen dollars and sixty nine cents ($214.69) on his campaign, including buying professionally done posters and providing pizza for campaign workers.

Thus, Flint spent more than the $100 allowed in order to respond to the third-party advocacy, and because he believed that the spending limit was unlawful, violating his First Amendment right to speak freely on political issues, including his candidacy for ASUM Senate. Flint won election to the ASUM Senate, however, the ASUM removed Flint from office for violating the spending limit. Flint seeks to expunge any records reflecting that he was charged with violating a ASUM Bylaw and thereby removed from Senate office.[10] *See* App. 9a-10a & n.3.

III. The History of the Litigation

On May 5, 2004, Flint filed his Verified Complaint for declaratory and injunctive relief, under the First and Fourteenth Amendments to the U.S. Constitution. He filed a motions for a temporary restraining order

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[10]The Ninth Circuit correctly found this case was not moot because Flint sought "sought an order requiring school officials to expunge from the school records all mention of the disciplinary action," App. 9a (quotation marks omitted), which amounted to prospective relief. App. 12a.

and preliminary injunction on the same date. On May 6, 2004, the district court denied Flint's motion for a temporary restraining order. Defendants filed a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(1),12(b)(6) and 12(b)(7) on June 3, 2004.

On June 17, 2004, Flint filed an Amended Complaint, adding additional Defendants. On July 6, 2004, Defendants filed a motion to dismiss Flint's Amended Complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

After full briefing, a hearing on Flint's Motion for Preliminary Injunction was held on July 7, 2004, and on August 20, 2004, the district court denied the motion.

On September 8, 2004, the district court ordered the parties to submit filings as to why further briefing or argument was needed prior to resolution, or certifying that further briefing was unnecessary.

On October 8, 2004, the district court converted Defendants' Motion to Dismiss to a Motion for Summary Judgment under Fed. R. Civ. P. 56. Defendants' submitted supplemental materials in support of summary judgment, and on March 28, 2005, the court granted the motion. Judgment was issued on March 29, 2005, and Flint filed his Notice of Appeal on April 25, 2005.

The court of appeals affirmed the district court in an opinion filed June 1, 2007. A petition for rehearing en banc was filed on June 15, 2007, and the court denied it on July 13, 2007.

Reasons for Granting the Petition

I. This Case Involves a Matter of Great Public Importance Because Student Political Speech Is Seriously Jeopardized by the Ninth Circuit's Decision.

After the Ninth Circuit decided this case, this Court issued its opinion in *Morse*, 127 S. Ct. 2618. In *Morse*, this Court held that, under its school speech precedents, school authorities did not violate the First Amendment by restricting student speech at a high school event that was reasonably interpreted as advocating the use of illegal drugs. However, this Court noted that students' First Amendment rights are greatest with respect to their political and ideological speech. *Id.* at 2626 (citing *Tinker*, 393 U.S. 503).

The University of Montana justifies limiting student candidates' speech during student government elections as necessary "to prevent student government's being diverted by interests other than ones educational." App. 36a (internal quotations omitted). The Ninth Circuit agreed, reviewing the limits on student candidate speech under rational basis scrutiny and concluding that the expenditure limits "reasonably serve" UM's "pedagogical interests in educating student leaders at the University." App. 36a.[11]

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[11]The opinion defers to UM's self-defined educational interests throughout its analysis. *See* App. 17a (expenditure limits not subject to strict scrutiny because of "[t]he educational context of a university, the specific educational purpose of ASUM student government, and the numerous other limits placed upon student campaigning . . . ."); App. 28a (ASUM election a nonpublic forum because it "exists to allow campaigns for student office and to elect student representatives to ASUM leadership positions in order to

Holding limits on student candidate speech to only a reasonableness standard affords the barest protection to political and ideological advocacy. The Ninth Circuit ruling–sanctioning limits on students' political and social advocacy–is the paradigm of "abuse,"which concurring Justices Alito and Kennedy warned in *Morse* would follow deference to public schools' "educational missions":

> The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.
>
> During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of

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provide student candidates a valuable educational experience"); App. 35a-36a (spending limits are reasonable in light of the purpose of the elections because ASUM "has [always] been subject to [UM's] educational mission"; expenditure limits are "vital to maintain the character of ASUM and its election process as an educational tool, rather than an ordinary political exercise" and they "prevent student government's being diverted by interests other than ones educational." App. 36a (internal quotations omitted)).

> world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground that the buttons signified approval of war. *The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.*

Morse, 127 S. Ct. at 2637 (Alito & Kennedy, JJ., concurring) (emphasis added).

The Ninth Circuit's decision, therefore, conflicts with *Morse* in its treatment of student political speech[12] and its deference to a public school's educational mission, and it approves limits on political speech of startling breadth–limiting extracurricular candidate speech funded by the student himself, without regard to where it occurs, on campus or throughout the city of Missoula.

In determining that UM created a limited public

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[12]Justice Alito, joined by Justice Kennedy, conditioned his support of the opinion in *Morse* on the understanding that:

> a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it *provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue*, including speech on issues such as "the wisdom of the war on drugs or of legalizing marijuana for medicinal use."

Morse, 127 S. Ct. at 2636 (Alito & Kennedy, JJ., concurring) (emphasis added) (citation omitted).

forum by allowing student government elections, and in finding that the restrictions are reasonable in light of the purpose of the elections, the court below was deciding a case that lies at the intersection of three complex and confusing areas of First Amendment law: campaign finance, school speech, and public and nonpublic fora.

Do the facts that ASUM is student government and the speech to be limited "occur[s] mostly, if not exclusively, on a *university campus*," App. 17a, distinguish ASUM elections from other elections? Does this Court's protection for candidate speech in *Buckley*, *White*, and *Randall* apply? Or is this case governed by this Court's "school speech" precedents such as *Tinker* and *Morse*? *See Morse*, 127 S.Ct. at 2624 ("There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents . . . .").

Or do these same facts mean that, under *Widmar*, the government has created a forum–the election is open to everyone's campaign speech, which takes place only partly on university property, but also on the public streets and sidewalks of the city in which the university resides? *See* App. 17a ("[T]he expenditures occurred mostly, if not exclusively, on a *university campus*.").

If not a spatial forum, is the election a "metaphysical" forum under *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830, (1995) or *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) even though neither government speech or access to government funds is at issue? *See* App. 21a n.8 ("it is Flint's spending of his own money that was regulated, not University funds or subsidies to Flint.") Does *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) apply even though the

speech here is extracurricular and not sponsored in any way? *See* App. 21a n.8 ("We are presented in this case not with the speech of the University of Montana but with the speech of students involved in campaigning for student government.").

If the government has created a forum, is it a "designated public forum" or a "limited public forum"? What level of scrutiny is required under each? Or does the university's educational mission justify all limits on students' political speech, regardless of the type of forum created?

These are important questions. The characterization of the speech and its circumstances determines the analysis employed, and the analysis largely determines the level of protection afforded the students' speech.[13] Students' right to free speech on public university campuses should not depend on "classification game[s]" or semantics, and this Court should provide authoritative answers to these questions. *Gilles v. Blanchard*, 477 F.3d 466, 474 (7th Cir. 2007).[14]

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[13] *See, e.g., Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 441-43 (5th Cir. 2001) ("The level of scrutiny applied to regulations of student expression depends on the substance of the message, the purpose of the regulation, and the manner in which the message is conveyed").

[14] "[S]chool expression case law has developed into a jumbled jurisprudence of labels, in which "inappropriate" expression may be quashed. . . . [T]his area of the law has become little more than "an elaborate, even byzantine scheme of constitutional [categories] . . . [that are] virtually impermeable to common sense." *Silenced Students*, *supra* 3, at 182 (citation omitted).

II. The Ninth Circuit's Ruling Conflicts with this Court's Treatment of Limits on Expenditures for Campaign Advocacy.

Little more than a year ago, in *Randall*, this Court reaffirmed that limits on expenditures for speech on behalf of a candidate's election are subject to strict scrutiny because they "necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 126 S. Ct. at 2488 (quotation marks and citation omitted). "Well- established precedent makes clear that . . . expenditure limits violate the First Amendment." *Id.* at 2485. The Ninth Circuit, however, held that "traditional First Amendment analysis" is applicable here and rejected the application of *Buckley* to the expenditure limits. App. 16a.

A. The Lower Court's Ruling Conflicts with this Courts' Precedents Universally Condemning Expenditure Limits.

The Ninth Circuit distinguished *Buckley* and *Randall* on the basis that the "election [was] to *student government* and . . . the expenditures occurred mostly, if not exclusively, on a *university campus.*" App. 17a (emphasis in original). The court admits that "ASUM undoubtedly has an impact on students at the University and has certain powers to distribute funds among student groups," *id.*, but found "several differences . . . between ASUM's elections and state and national political elections" that justified forgoing the strict scrutiny mandated by *Buckley* and *Randall.* App. 18a-19a n.7.[15]

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[15]The Ninth Circuit's decision abrogates *Welker v.*

The Ninth Circuit reasoned that the ASUM limits are not subject to the strict scrutiny universally applied to expenditure limits because:

> 1) ASUM's control is not as pervasive as government seated in the state capital;
> 2) the ASUM's sovereign power derives from the Board of Regents;
> 3) the University sees the ASUM primarily as an educational tool, as evidenced by the facts that:
>
> > a) a student must maintain at least a 2.0 grade point average to run for office; and
> > b) only students are allowed to vote in the election.

See App. 17a-19a.

The first point, if a valid consideration, leads to a curious result. If First Amendment rights vary with the "ubiquity" of government's power to control facets of citizens' lives, then it follows that the federal government, which has less presence in a UM student's life than does the ASUM, has greater leeway in regu-

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Cicerone, 174 F. Supp.2d 1055 (C.D. Ca. 2001), a case with nearly identical facts. The court in *Welker* noted that the university elections code "governs student elections at a state university" and that *Buckley* was applied to state elections, *id.* at 1064-65, and saw "no reason to distinguish between applying *Buckley* to state political elections and political elections at state universities." *Id.* at 1065. The court found inapposite the "generally relaxed First Amendment standard applicable to the college and university setting" because "an expenditure restriction does not implicate an institution's scarce resources,' relate to the school's curriculum, or tread on administrators' areas of expertise." *Id.* at 1065.

lating speech. Moreover, this Court noted in *White* with respect to elections to the judiciary that the First Amendment rationale supporting "unconstrained speech in elections for political office" applies where ever the elected candidates make or set aside law. 536 U.S. at 784. ASUM makes laws, including the one at issue here; it interprets and amends the ASUM Constitution, wields the power of the purse, and oversees and appoints members to Boards and Commissions that *do* control many facets of UM students' lives.

As to the source of ASUM's power, agencies are created by the legislature to execute and enforce regulations of speech in the federal government and in every state and ASUM is an agency of the state. Those agencies are no less government and their regulations are not deferentially reviewed simply because the agency is not the ultimate source of its authority.

This leaves the third argument, that the elections to ASUM and the ASUM are primarily educational in purpose and thus subject to UM's educational interests. Despite ASUM's lawmaking and executive functions, the Ninth Circuit explains that the elections are primarily educational, because *candidates* must have a "C" average and the *electorate* are UM students. *See* App. 17a.

Conditions of *candidacy* are not indicia of an educational purpose, as they are not unique to the university setting. Candidates for federal and state office must meet age, residency, and/or citizency requirements and state candidates must often meet petition signature requirements. Such requirements do not implicate the First Amendment and are supported by government's interest in conducting elections. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983).

The fact that the *electorate* is UM students does not establish a purpose for the elections, it simply restates that the elections take place at a university for a student government. And qualifications for *voting* are irrelevant in showing an educational purpose in limiting *candidates' speech*. Thus, qualifications for candidates and the electorate say nothing about *campaigns* for office to the ASUM, where core First Amendment speech is at issue, and

> the First Amendment does not permit [government] to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about. [T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.

White, 536 U.S. at 788 (internal quotations and citations omitted).

B. The Challenged Regulations' Effect on Political and Social Advocacy Extends Beyond Speech Directed at a Candidate's Election.

There is no question that candidates' speech is at the core of the First Amendment's protection. *Buckley*, 424 U.S. at 14-15.[16] And limiting the debate surround

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[16] *See* App. 14a ("*Buckley* and its progeny . . . classify the student campaign expenditures as "speech" worthy of First Amendment protection."); App. 23a n.9 (" . . . the University

ing student government elections also has broad secondary First Amendment consequences.

The ASUM is the source and the gatekeeper of much of the expressive activities at UM and the interaction between the student body, the administration and the state legislature. The ASUM Senate and the Board on Member Organizations review all applications for groups and organizations seeking official recognition and student activity fee funding. Official recognition and funding allow these groups to provide services for UM's 10,000 students and fund advocacy by a wide range of ideologically diverse groups.

The elections are debates on these functions and issues as well as on candidates' qualifications for office, as candidates' views and positions on ASUM's actions and policies are discussed in support or opposition to their election to office. Moreover, election to the ASUM Senate brings a measure of control over the advocacy allowed on campus by the groups and organizations seeking recognition and student activity fee funding. The breadth of speech affected by the challenged regulations extends to the entire UM campus and beyond.[17]

. . . is *allowing* the campaign-related speech"; App. 35a (the limits "preserve the character" of "ASUM and its election process as an educational tool, rather than an ordinary political exercise"); App. 37a n.12 ("even . . . pure political speech" is subject to restriction in a limited public forum).

[17] As *Buckley* said:

> Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression

III. The Decision Conflicts with this Court's Precedents Establishing Students' First Amendment Rights and with the Decisions of Other Circuits.

In *Morse*, this Court explained the proper balance between the First Amendment rights of students and the countervailing government interests. The relevant factors are: the nature of speech or activity at issue, 127 S. Ct. at 2626 (distinguishing *Tinker* from the case before it on the basis of the type of speech at issue), the relevant government interests, especially those flowing from the special characteristics of the school environment, *id.* at 2626-27 (explaining that the special characteristics of the high school context in which it occurred made the speech at issue in *Fraser* regulable), and the threat the speech poses to those interests. *Id.* at 2628 ("Student speech celebrating illegal drug use at a school event . . . poses a particular challenge for school officials working to protect those entrusted to

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> in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . ." "[T]here is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates. . . ." This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

424 U.S. at 14-15 (citations omitted).

their care from the dangers of drug abuse.").

Public school students' First Amendment rights are greatest when they seek to engage in political and ideological speech. *Id.* at 2626 (citing *Tinker*, 393 U.S. at 519). Answering concerns that the decision could chill "national debate about a serious issue," this Court explained that, unlike black armbands worn by students to protest the war in Vietnam the speech at issue in *Morse*, the banner high student Joseph Frederick unfurled during a high school field trip, "BONG HiTS 4 JESUS," was "plainly not . . . political debate" and did not merit the protection afforded political speech. *Id.* at 2625.[18]

While students' First Amendment rights must be viewed in light of certain " special characteristics of the school environment,'" this Court reiterated in *Morse*

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[18] *See also id.* at 2626 ("The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment"); *id.* at 2627 n.2 (explaining that the holding in *Morse* does not conflict with *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. __ (2007), because Frederick's banner was not political speech and the setting in *Morse* was a public high school).

Elsewhere, this Court has explained that *Tinker* applies when the question is whether the school must *tolerate* students' speech as opposed to *promoting* it, *see Hazelwood*, 484 U.S. at 270-71, and other Circuit's have applied or denied the *Tinker* standard on this basis. *See, e.g. Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) ("student speech that happens to occur on the school premises,' such as the black armbands worn by the students in *Tinker* . . . [is] pure student expression that a school must tolerate unless it can reasonably forecast that the expression will lead to "substantial disruption of or material interference with school activities."'" (citations omitted)).

that political advocacy, even in this context, remains "at the core of what the First Amendment is designed to protect." *Id.* at 2626. And two concurring Justices warned against expanding deference to any educational or other interests beyond that already recognized in its precedents. *Id.* at 2637 (Alito & Kennedy, JJ., concurring).

Here, at issue is students' own political speech, and the characteristics of the public university environment *underscore* students' First Amendment interests. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."). The political speech is not sponsored in any sense because it is not made possible by UM funds, UM does not approve or review it, and it is limited whether it happens to occur on university property or not. App. 23a n.9 (". . . the University is not sponsoring . . . any of the candidates' speech but is *allowing* the campaign-related speech"); App. 27a ("Flint challenges the limitations on speech within the confines of the ASUM election, whether the speech is delivered on campus or off . . . ."). Yet the Ninth Circuit applied the least rigorous standard of review and found UM's educational interests sufficient justification.

Other Circuits, however, have applied the *Tinker* standard in similar circumstances. *See Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 469 (6th Cir. 2000) (*Tinker* standard applies "to justify the prohibition of a particular expression of opinion"); *Chandler v. McMinnville School Dist.*, 978 F.2d 524, 529 (9th Cir.1992) (citations omitted) (". . . the standard for reviewing the suppression of vulgar, lewd, obscene, and

plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*); *Henerey v. City of St. Charles, School Dist.*, 200 F.3d 1128, 1132 (8th Cir. 1999) (parallel citations omitted):

> Purely individual speech by students constituting "personal expression that happens to occur on the school premises" is subject to a high degree of First Amendment protection. *Hazelwood*, 484 U .S. at 271. However, school officials may restrict even individual student expression that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school," or that "would substantially interfere with the work of the school or impinge upon the rights of other students." *Tinker*, 393 U.S. at 509 (citations and internal quotation marks omitted).

A. The Ninth Circuit's Decision Conflicts with the Analysis of the Only Other Circuit That Has Addressed Restrictions on Public University Student Government Candidates' Campaign Speech.

The Ninth Circuit's ruling specifically requires forum analysis when limits on university student candidates' campaign speech are reviewed, which conflicts in principle with the Eleventh Circuit.

In *Alabama Student Party v. Student Gov't Ass'n of the University of Alabama*, 867 F.2d 1344 (11th Cir. 1989), the Eleventh Circuit expressly eschewed forum analysis when presented with restrictions on student candidate campaigns. The Eleventh Circuit applied a

"reasonableness" standard it gleaned from this Court's school speech precedents, not from its public forum precedents. *Id.* at 1346-47.[19]

Highlighting the confusion in this area, the dissent argued that the district court had been correct in analyzing the restrictions as in a forum, *id.* at 1349-50 (Tjoflat, J., dissenting), and also pointed out a problem with analyzing student government candidate speech as a forum that the Ninth Circuit did not consider.[20] He noted that limits on student government campaigns inevitably cross into traditional on-campus public fora. *Id.* at1354 n. 6 (Tjoflat, J., dissenting). As the Fifth Circuit has similarly noted, even if the limits applied only to on-campus speech,

> [a] modern university contains a variety of fora. Its facilities may include private offices, classrooms, laboratories, academic medical centers, concert halls, large sports stadiums

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[19]The standard usually attributed to *Hazelwood* is that the restriction must be "reasonably related to a legitimate pedagogical interest." *Hazelwood*, 484 U.S. at 273. It is not clear whether this is the standard applied in *Alabama Student Party*, or whether it is less strict than the "reasonableness" standard applied here, since the Ninth Circuit distinguished its standard from that of *Hazelwood* and *Alabama Student Party*. App. 22a n.9, 19a.

[20]The dissent also illustrates the confusion among the Circuits as to what constitutes a designated public forum, a limited public forum, and the scrutiny applied in each. *Id.* at 1353 ("the district court determined that the campus fell within the limited public forum' category of government property. I would agree. I conclude, however, that the district court erred in its application of the constitutional standard governing this type of forum."). *See supra* 25-31.

> and arenas, and open spaces. . . . Its open spaces. . . come in a number of different types. Some are enclosed quadrangles bordered on all sides by university buildings and traversed by sidewalks, while others are grassy areas or plazas on the edge of campus where the University's grounds abut the city property. Thus, labeling the campus as one single type of forum is an impossible, futile task.

Bowman v. White, 444 F.3d 967, 976-77 (5th Cir. 2006). Here, the limits apply to both on- and off-campus traditional public fora, facts that the Ninth Circuit's forum analysis did not consider.

IV. The Ninth Circuit's Decision Conflicts with That of Other Circuits as to Whether Forum Analysis Is a Necessary Precursor to Application of this Court's School Speech Precedents.

Is forum analysis a necessary precursor to the school speech precedents, as the Ninth Circuit held? *See* App. 23a n.9. The Circuits are split. *Compare, e.g., Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc) (analyzing content-based restrictions of a college student newspaper as a forum and explaining that educational interests noted in *Hazelwood*, 484 U.S. 260, apply in the college setting as to the reasonableness of the challenged regulation) *with Kincaid v. Gibson*, 236 F.3d 342, 348 n.6 (6th Cir. 2001) (en banc) (applying forum doctrine in a similar situation but explaining that doing so "has no bearing on the question of whether and the extent to which a public university may alter the content of a student newspaper," noting "that a college yearbook . . . might be analyzed under a framework other than the forum

framework," and citing cases from the Eighth, Fifth, and Fourth Circuits, and the District of Massachusetts analyzing incursions on students' First Amendment rights under various doctrines without employing forum analysis) *and with Vanderhurst v. Colo. Mountain Coll. Dist.*, 208 F.3d 908, 915 (10th Cir. 2000) (applying the *Hazelwood* standard to regulation of a professor's comments without analyzing whether they were made in a public or non-public forum). Does its application hinge on whether the speech occurs on campus? *See Porter v. Ascension Parish School Bd.*, 393 F.3d 608, 615 n. 22 (5th Cir. 2004) (collecting cases providing different answers to this question). Or is the age of the student or the level of school dispositive? *Compare, e.g., Student Gov't Ass'n v. Bd. of Trustees of the Univ. of Mass.* 868 F.2d 473, 480 n.6 (1st Cir. 1989) *with Hosty*, 412 F.3d 731.

V. The Ninth Circuit's Determination That the ASUM Elections Are a Limited Public Forum Conflicts in Principle with this Court's Precedents and the Decisions of Other Circuits.

The Ninth Circuit found the ASUM elections were not a designated public forum, in which strict scrutiny would apply, because "... the ASUM election provides for the selection of students to govern student affairs; the election does not provide University installations *for outsiders to showcase ideas in general.*" App. 28a (emphasis added). *See also id.* ("[The] Bylaws certainly do not permit students or the *general public* to use the ASUM election system *indiscriminately.*" (emphasis added)).

But this Court has explained that a designated public forum, in which strict scrutiny applies, is

created when "government . . . intend[s] to make the property *"generally available' to a class of speakers."* *Arkansas Educational Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (*"AETC"*) (citation omitted). Using the facts in *Widmar* as an illustration, the Court in *AETC* explained that there, the Court found that the university had created a designated public forum for registered student groups by implementing a policy that expressly made its meeting facilities "generally open' *to such groups."* *Id.* at 679 (emphasis added) (citation omitted).[21]

Here, the Ninth Circuit denied UM had created a designated public forum, because it found the elections were not generally open, in terms of *both* participants and expression. *See* App. 28a-29a n.11 (reading *Widmar* and *Perry* to require general access in both categories to create a designated public forum).

The election is generally open to all students who meet the qualifications to run and *anyone* could express their views on who should be elected and why. The lower court's distinction between the ASUM elections and the forum in *Widmar* is a false one. *See* App. 28a-29a n.11. The forum is generally open as to *participants* in the same way the facilities were open to student groups and organizations in *Widmar*, yet the lower court denied that the elections were a designated public forum in which restrictions are subject to strict scrutiny.

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[21] *See also Perry Education Association v. Perry Local Educators' Assoc.*, 460 U.S. 37, 45-46 & n.7 (1983) (designated public fora as created when government opened a place or channel of communication for the public at large, including for use "by certain groups, *e. g.*, *Widmar* (student groups), or for the discussion of certain subjects.").

Moreover, UM's limits on *expression* during the elections do not make them into limited public fora. First, the Ninth Circuit "bootstrapped" the expenditure limits (and the purported educational benefits thereof) into the question of whether UM had opened only a limited public forum. *See* App. 27a n.10. And apart from the expenditure limits themselves, the only limits on expression imposed on participants are content-based restrictions on the time, place and manner of campaigning. App. 30a-31a. Such restrictions are evaluated in light of the type of any forum in which they occur, and not vice versus. *See Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981) (considering whether Minnesota had created a public forum in evaluating the constitutionality of what it claimed were valid time, place or manner restrictions).

Like the bootstrapping noted above, to consider content-based restrictions on expression in determining the type of forum created is to employ circular reasoning: government creates a limited public forum when it limits expression in a way the permissibility of which depends on the type of forum the government has created. This analysis conflicts with *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 547 (2001) (government cannot "recast a condition on funding [for speech] as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise.").[22]

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[22]This approach also conflicts with that taken in other cases in the Ninth Circuit. *See Hills v. Scottsdale Unified School Dist.*, 329 F.3d 1044, 1049-50 (9th Cir. 2003) ("In making a forum type determination, it is important to separate the question of the propriety of the exclusion . . .

A. The Ninth Circuit's Determination That Student Government Elections Are Limited Public Fora Conflicts with the Analysis of Other Circuits.

The Ninth Circuit found that a limited public forum is a species of nonpublic forum in which limits on speech were constitutional, if they are viewpoint neutral and reasonable in light of the educational purposes of the forum. App. 31a-32a; 35a-36a. But Circuits differ in how they determine the type of forum at issue and whether a limited public forum is a nonpublic or public forum. This determination determines the level of scrutiny: regulation in a public forum must survive strict scrutiny, while regulation in a nonpublic forum is deferentially reviewed.

This has led to confusing results among the Circuits.[23] As the Ninth Circuit itself has explained:

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from the meaning of the exclusion in terms of the intent and scope of the forum.");

[23] *See generally, "What's in a Name?" supra* 3 (noting that the First, Third, Sixth, Eighth, Eleventh and D.C. Circuits have held that the limited public forum is either the same as or a subset of the designated public forum and that regulation in both is subject to strict scrutiny; the Second, Fifth, Seventh and Ninth Circuits say the limited public forum is either a designated or nonpublic forum but apply only rational basis review to regulation; the Tenth Circuit finds that limited public fora have been located in both designated and nonpublic fora and that strict scrutiny applies in limited-designate public fora and the reasonableness standard in nonpublic- limited public fora; the Second and Fourth Circuits have held that limited public fora are designated public fora, and made the standard of scrutiny dependent upon whether the speaker falls within the class

> The designated public forum has been the source of much confusion. As this court has put it, with considerable understatement, "The contours of the terms designated public forum' and limited public forum' have not always been clear." Some courts and commentators refer to a "designated public forum" as a "limited public forum" and use the terms interchangeably. But they are not the same, at least not in this circuit. Rather, a limited public forum is a sub-category of a designated public forum that "refers to a type of non-public forum that the government has intentionally opened to certain groups or to certain topics." "In a limited public forum, restrictions that are viewpoint neutral and reasonable in light of the purpose served by the forum are permissible."
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> n8 This categorization admittedly leads to the strange semantic result that a limited public forum is not actually a public forum. Therefore, in our analysis here, when we refer to a "public forum " (where strict scrutiny applies), we are referring to a designated

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established by the government: if the excluded speaker falls within the class to which a limited public fora has been made generally available, the class is treated as a traditional public forum, and strict scrutiny applies; these Circuits apply an "external standard" in reviewing the government's ability to designate the class, subjecting the designation to only rational basis review.).

> public forum (where strict scrutiny applies), but not to a limited public forum (where the reasonableness test applies).

Hopper v. City of Pasco, 241 F.3d 1067, 1074-75 (9th Cir. 2001) (footnotes in first paragraph omitted, citations omitted throughout).

The Sixth Circuit describes its view of the situation:

> These are the three categories of fora presently recognized in this circuit. We note, however, that there has been some uncertainty among the circuits as to whether there are one or two categories of fora other than "public" and "nonpublic," and what protection is due to these categories. Some courts have analyzed separate categories of "designated" and "limited" public fora, while others have found only one other category. *See, e.g., The Good News Club v. Milford Centr. Sch.*, 202 F.3d 502, 508-09 (2d Cir. 2000) (drawing no distinction between designated and limited public fora, and stating that restrictions on these limited public fora must be "reasonable and viewpoint neutral"); *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 182 n. 2 (3d Cir.1999) (stating that the designated forum is a nontraditional forum opened for "public discourse," but that the Court has also "discussed limited' public fora, which are designated for expression, but only on limited topics," and choosing to treat both categories under the stricter standards for designated public fora); *Warren v. Fairfax County*, 196

> F.3d 186, 193-94 (4th Cir.1999) (en banc) (treating designated and limited public fora as the same category, and setting up two standards for this forum-an "internal" standard, which gives strict scrutiny protection for the class of speakers to whom the forum was opened and an "external" standard, which "places restrictions on the government's ability to designate the class for whose especial benefit the forum has been opened"); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 964-65 (9th Cir.1999) (distinguishing between a designated public forum, which is a nontraditional forum intentionally opened for public discourse that receives the same First Amendment protection as a traditional public forum, and a limited public forum, which is "a type of nonpublic forum that the government intentionally has opened to certain groups or to certain topics," but noting that the contours of these fora have not been clearly defined by the Court).

Putnam Pit, Inc. v. City of Cookeville, Tenn., 221 F.3d 834, 842 (6th Cir. 2000).

And the Ninth Circuit's bootstrapping the challenged restriction into the question of the type of forum, noted above, conflicts with the Second and Third Circuit's forum analysis. *See New York Magazine v. Metropolitan Transp. Authority* 136 F.3d 123, 129 - 130 (2d Cir. 1998) ("This reasoning would allow every designated public forum to be converted into a nonpublic forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content."); *Christ's Bride Ministries, Inc. v. Southeastern Pennsyl-*

vania Transp. Authority 148 F.3d 242, 251 (3d Cir. 1998) ("'standards for inclusion and exclusion' in a limited public forum must be unambiguous and definite' if the concept of a designated open forum is to retain any vitality whatever.'" (citation omitted)).

Elections to university student government are political debates with far-reaching consequences for expression at universities and society in general. If they are fora, it is imperative that they be uniformly treated among the Circuits.

VI. The Ninth Circuit's Determination That Student Candidate Expenditure Limits Are Justified by the University's Educational Mission Is Irrational.

The Ninth Circuit concludes that the expenditure limits further UM's pedagogical interests by "requir[ing] student candidates to focus on desirable qualities such as . . . answering questions face-to-face with one's potential constituents. . . . forc[ing them] to campaign personally . . . ." App. 36a. This is not a legitimate educational interest. UM has no educational interest in seeing candidates spend more time campaigning one way rather than another as opposed to spending less time campaigning and more at their studies. [24] Moreover, UM prohibits the very thing at which it claims the limits are aimed. "No door-to-door campaigning is permitted in the residence halls or family housing. Campaigning is permitted elsewhere

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[24] And, outside the educational context, as affirmed in *Randall*, expenditure limits are not justified by any government interest in "protect[ing] candidates from spending too much time raising money rather than devoting that time to campaigning among ordinary voters." *Randall*, 127 S. Ct. at 2489.

on campus, including the Lodge and classrooms with permission of the professor." App. 69a.

At bottom, the court's rationale for rejecting strict scrutiny and affording political speech the barest of First Amendment protection is based on its deference to the university's broad view of its educational mission, and the decision fails to adequately connect the limits with any legitimate educational interest.

Conclusion

The lower court did not consider this Court's decision or rationale in *Morse*, which casts doubt on its treatment of student candidate speech. This Court should grant Flint's petition and vacate the Ninth Circuit's decision and remand the case for reconsideration in light of *Morse* or, in the alternative, this Court should grant certiorari and set the case for briefing on the merits.

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